BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTA L. COPP	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. **1,039,950**
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the June 1, 2011 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on October 11, 2011. The Workers Compensation's Director appointed Joseph Seiwert of Wichita, Kansas, to serve as Board Member Pro Tem in place of former Board Member Julie A.N. Sample.

APPEARANCES

George H. Pearson, of Topeka, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) determined that claimant suffered work-related injuries to her bilateral lower extremities in a fall at work. The ALJ further determined that as a natural consequence of her ankle and knee injuries the claimant developed an antalgic gait which led to a whole body permanent impairment to her back. Because

claimant suffered bilateral lower extremity injuries the ALJ concluded that raised the presumption claimant suffered a permanent total disability.[1] The ALJ further determined respondent never rebutted that presumption. Therefore, the ALJ awarded claimant benefits for a permanent total disability. In the alternative, the ALJ noted that if claimant did not suffer permanent total disability, she met her burden of proof to establish she was entitled to an 85.5 percent work disability based upon a 100 percent wage loss and a 71 percent task loss.

Respondent requests review of the nature and extent of claimant's disability. Respondent argues that the presumption of permanent total disability pursuant to K.S.A. 44-510(c)(a)(2) is only applicable for loss of a scheduled member and not for loss of use. And because claimant did not suffer the loss of or amputation of the lower extremities the presumption is not applicable. Respondent further argues that claimant failed to establish that she suffered an injury to her back as a result of her employment.

Claimant argues that case law supports the ALJ's determination that the presumption of permanent total disability does not require an amputation of the scheduled member. Consequently, claimant requests the Board to affirm the ALJ's Award. In the alternative, claimant argues she has met her burden of proof to establish that she suffered an 85.5 percent work disability.

The sole issue for Board determination is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a corrections supervisor for the women's prison facility at the Topeka Correctional Facility. On March 11, 2008, claimant was participating in a weather drill at the facility. Her task was to get the inmates down to the first floor of the facility by way of some stairs. As claimant was 4 or 5 stairs from the bottom, her left foot got caught and her left ankle twisted causing her to fall down the remaining stairs. She landed on her hands and knees. Claimant testified that she immediately felt pain in her left ankle and both knees.

As a result of the injuries suffered in the fall, claimant ultimately had two surgeries performed on her left ankle by Dr. Greg Horton as well as surgeries on her bilateral knees performed by Dr. Peter Lepse. The first surgery on her left ankle was performed by Dr. Horton on October 29, 2008. Claimant then had surgery by Dr. Lepse performed on her

[1] See, *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 516, 154 P.3d 494, *reh. denied* (2007).

left knee on March 11, 2009, and then on her right knee on July 1, 2009. The second left ankle surgery was performed by Dr. Horton on October 21, 2009. Claimant worked light duty in respondent's office from the date of the accident until October 20, 2008.

Claimant testified that she also began to have back pain in June 2008. She attributes her back pain to the altered gait she developed from her bilateral knee and ankle injuries suffered in the March 11, 2008 accident. She reported that the use of crutches for her knee and ankle injuries also made her back pain worsen.

Claimant reported her back pain in June 2008 to Dr. Lepse, who told her that she needed to submit her own health insurance coverage information in order to be seen for her back. Since Dr. Lespe only treats knees he would have had to refer the claimant to someone else, so claimant decided to go and see her primary care physician, Dr. John Bernard to have her back examined. Claimant met with Dr. Bernard on June 3, 2008 the same day she told Dr. Lepse about her back complaints.

Claimant agreed that for the first two years or more after her accident the focus of her treatment was more on her ankle and knees than her back mostly because that is where she had the most pain. But because of her back complaints, Dr. Horton prescribed physical therapy not only for the left ankle but also the back so that she would be able to function. Claimant was also prescribed a TENS unit for her back pain complaints.

While receiving follow-up treatment after her second ankle surgery claimant continued to complain of back pain and respondent referred her to Dr. Christopher Fevurly. Claimant met with Dr. Fevurly on January 11, 2010, with complaints of low back pain associated with bilateral leg symptoms of numbness and tingling, left ankle pain, and aching and numbness around the knees, the left worse than the right. Dr. Fevurly indicated in his report that during his examination of claimant, she had difficulty with transfers and displayed an antalgic, limping gait.

Dr. Fevurly found claimant to have full range of motion of the cervical spine to rotation, flexion, extension and lateral motion with a negative Spurling's test. Claimant had full range of motion in her shoulders, elbows, wrists and hands. She also had mild loss of the normal lumbar lordosis and her range of motion in her lumbar spine was limited with forward bending to less than 20 degrees and extension just to neutral, lateral bend less than 20 degrees and claimant displayed profound pain behaviors at the extremities of all lumbar motion. Claimant had full range of motion in both knees and limited range of motion in the left ankle. Dr. Fevurly also indicated that straight leg raises to 100 degrees produced some back pain.

In a letter to the medical case manager assigned to claimant, Dr. Fevurly opined the following regarding claimant's low back complaints:

> The work relatedness of the low back pain is allegedly the result of her prolonged antalgic gait. There is little to no doubt that she will have degenerative disc disease based on her age and her body mass index. Be that as it may, due to lack of improvement over a nearly two year span of chronic low back pain, it would be reasonable to pursue further diagnostic testing of the lumbar spine including flexion/extension x-rays of the lumbar spine and an MRI of the lumbar spine.
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> . . .
>
> The current complaints are predominately low back pain and this is most likely regional low back pain and associated with degenerative disc disease degenerative changes in the lumbar spine . . .
>
> There is no interview evidence for preexisting symptoms or complaints and at this point it would appear that the symptoms are clinically connected to the work event and underlying psychological, social, behavioral and environmental factors.[2]

He went on to opine that claimant should have 6-12 physical therapy visits for the low back after which time claimant would most likely be at maximum medical improvement and an impairment rating could be assigned. Although claimant has not returned to work Dr. Fevurly opined that claimant could work light duty lifting no more than 10-15 pounds and have the ability to sit or stand as needed for pain control.

When deposed, Dr. Fevurly explained that in his report which stated claimant's back symptoms were clinically connected to the work event, he merely was reciting claimant's history of her symptoms that she had no back pain until after the accident. And although Dr. Fevurly agreed claimant had a 5 percent whole person impairment to her lumbar spine he further noted that it was not related to her accidental injury on March 11, 2008, as he did not believe claimant's altered gait changed the underlying anatomy or the appearance of the her lumbar spine. But Dr. Fevurly agreed that with surgeries to both knees and two surgeries to the left ankle, an altered gait was not unexpected.

Claimant received a letter from respondent dated March 2, 2010, terminating her employment stating the reason as she could not perform her duties, and that her restrictions could not be accommodated. Claimant was given the option, but chose not to meet with respondent about the termination of her employment. Claimant received another letter dated March 10, 2010, officially terminating her employment. After claimant received this letter she went to human resources and spoke with John Harold, the HR manager. Claimant testified that she told Mr. Harold that she would come back to work if she could. Claimant's termination stood as respondent determined it could not accommodate her restrictions.

[2] Fevurly Depo., Ex. 2 at 6.

In March 2010, claimant applied for short-term disability through KPERS. She continues to receive these benefits, but would like to return to work. Claimant has been unable to find work since being terminated and her only source of income is disability through KPERS, which she receives because she was disabled from doing her job at the Correctional Facility.

Claimant filed an application for a preliminary hearing in March 2010 seeking medical treatment for her back recommended by Dr. Fevurly. On May 11, 2010, the ALJ entered a preliminary hearing order for an independent medical examination of claimant by Dr. Edward Prostic.

Claimant met with Dr. Edward Prostic on June 16, 2010. At this visit, claimant's main concern was deep pain and recurrent numbness in the left ankle. Claimant reported that the numbness is worse when her leg hangs down, or when she is standing or walking. She reported soreness in the left knee anteromedially and anterolaterally with clicking and popping and worsening with more than short-term standing and right knee pain anteromedially. Finally, claimant reported pain across her low back at the waist with worsening when she sits, stands, walks, bends, twists, lifts, pushes or pulls, or in inclement weather.

Dr. Prostic opined that claimant's knee and ankle injuries from her March 11, 2008 accident in the course of her employment and which led to surgery and resulted in an altered gait has caused claimant to develop lumbar strain and sprain. He also attributed abnormal body mechanics to claimant's low back injury. He testified that the claimant has been limping for so long because of the problems with her knees and left ankle that she developed an abnormal muscle strain to the low back and the combination of that and claimant's excessive weight led to her sore back. He went on to assign a 5 percent permanent partial impairment to the body as a whole for the lumbar spine, 10 percent to each lower extremity for chondromalacia and patellar instability, and 25 percent the left lower extremity for intra-articular fracture and lateral ligamentous reconstruction. These ratings were in accordance with the AMA *Guides*[3]. Dr. Prostic also recommended that claimant continue under the restrictions of Dr. Horton. No additional treatment for the back was recommended.

Respondent then referred claimant to Dr. John Ciccarelli. Claimant met with Dr. Ciccarelli's physician assistant, Amy Sclesky, on August 5, 2010, with complaints of low back and predominant left leg pain. Ms. Sclesky examined the claimant and opined that claimant sustained a work injury on March 11, 2008, that resulted in multiple injuries to the

[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

left ankle, bilateral knees and lumbar spine. She went on to opine that this injury was the predominant or prevailing cause of claimant's present low back pain.[4]

Ms. Sclesky recommended that claimant have an MRI of the lumbar spine and assigned restrictions of no lifting greater than 15 pounds, no repetitive bending, lifting, no operation of heavy machinery, and alternate sitting and standing activities each hour with mostly sedentary sit down duties.

Claimant's August 5, 2010 x-rays of the lumbar spine revealed mild levoscoliotic curvature thoracolumbar spine, L1-2 spondylitic changes with disk space collapses and disk space narrowing at L3-4.[5] Claimant's August 26, 2010 MRI of the lumbar spine revealed normal degenerative changes spanning L1-2 with reactive end plate change, mild disk space collapse and a nonstenotic broad based bulge. Claimant also had degenerative changes at L3-4 and L4-5.[6] Dr. Ciccarelli considered these changes consistent for claimant's age. Dr. Ciccarelli testified that he doesn't recall the claimant reporting any back symptoms prior to the March 11, 2008 fall.

Claimant met with Dr. Ciccarelli on August 26, 2010, for a follow-up visit. She continued to have stiffness in her back which he determined were subjective and pain in her legs. Dr. Ciccarelli opined that "[g]iven her multiple orthopedic injuries, this is obviously affected and deconditioned her overall walking abilities over time. Although there is no definitive studies that state any altered gait is a known contributor to back pain, it would not be unreasonable to state that she may benefit from some targeted therapy to her back just to help recondition her soft tissues and decrease some of her discomfort which may be chronic . . ."[7] He opined that 25 to 50 percent of claimant's back pain could be attributed to her altered gait. He did not find any actual injury to the low back.

Dr. Ciccarelli opined that claimant had myofascial low back pain and multiple histories of lower extremity orthopedic trauma and procedures. He didn't feel that claimant was in need of surgery based on her exam or x-rays but recommended rehabilitation, preferably aquatic therapy for 6-8 weeks and released claimant from his care regarding her spinal complaints. He deferred to Dr. Horton in regard to any medications or restrictions.

Dr. Ciccarelli opined that, if he had been asked to provide an impairment rating for the claimant, he would have placed her somewhere in between Category DRE I and DRE II of the AMA *Guides*, or 0 to 5 percent.

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[4] Ciccarelli Depo., Ex. 4 at 2.

[5] Ciccarelli Depo., Ex. 4 at 3.

[6] *Id.*, Ex. 2.

[7] *Id.*, Ex. 3.

Claimant testified that she first saw Dr. Hu on or about October 5, 2010, at the request of the State Self-Insurance Fund. Claimant testified that she almost missed the appointment because she was not notified about it until she heard from Dr. Hu's office informing her that she had an appointment that day and she needed to come in. Claimant went to the appointment and upon completion of his examination of claimant and her medical records, Dr. Hu informed claimant that she had chronic low back pain. Dr. Hu recommended shots (lumbar facet joint steroid injections) for claimant's back, pool therapy for a month at the YMCA and to continue working sedentary duty. Claimant elected to not have the injections because she didn't feel safe doing it and she didn't feel that a steroid would be good for her back.

Claimant met with Dr. Hu again on November 2, 2010, at which time he discussed with her the side effects of the injections that he recommended and that there were no guarantee that they would work, but that he had some patients that had success with them. Claimant testified that Dr. Hu seemed irritated by all of her questions. She testified that Dr. Hu told her she needed to make a decision on what she wanted to do and that she didn't have to choose the injections, but if she didn't there was nothing more he could do for her. Claimant continued to decline the injections and this was the last time that she met with Dr. Hu. She did however continue with her membership to the YMCA and took water classes.

Dr. Prostic met with the claimant again on December 13, 2010, at claimant's attorney's request to examine claimant and review the additional medical records compiled after Dr. Prostic had first seen claimant. After Dr. Prostic again examined claimant he continued to believe that claimant's March 11, 2008 accident which caused injury to claimant's knee and left ankle led to claimant developing an altered gait as well as claimant's lumbar sprain and strain superimposed upon preexisting degenerative disc disease. Dr. Prostic didn't feel that additional treatment would be beneficial to the claimant and again found claimant to have a 5 percent permanent partial impairment of function to the body as a whole for the lumbar spine, 10 percent to each lower extremity for chondromalacia and patellar instability, and 25 percent the left lower extremity for intra-articular fracture and lateral ligamentous reconstruction. He also recommended that claimant continue under the restrictions of Dr. Horton. Dr. Prostic also had to opportunity to review the task list compiled by Dick Santner and opined that claimant could no longer perform 11 out of 19 tasks for a task loss of 57.9 percent.

Claimant met with Dr. P. Brent Koprivica for an examination on January 3, 2011, at claimant's attorney's request. Dr. Koprivica examined claimant and opined that claimant's physical presentation is representative of her objective physical impairment. He indicated that claimant was limited on her sitting tolerances and therefore the interview took 3 hours. He also reported that claimant was limited in her lumbar motion testing because she avoided weight bearing on the left leg with standing and walking tasks.

Upon completion of his examination of claimant, Dr. Koprivica opined that claimant's multiple physical impairments are a direct and proximate cause of claimant's work injury on March 11, 2008. Dr. Koprivica opined that claimant developed chronic back pain based on an altered gait of a permanent nature. His diagnosis of claimant's knee problems was patellar femoral arthraligia based on direct injury to the anterior knees bilaterally being status post patellar chondroplasty. He also found that claimant had direct injury to her left ankle with left talar dome osteochondral traumatic injury with development of osteochondritis dissecans lesion along with the development of a lateral ligamentous injury. He went on to opine that in his opinion claimant's chondromalacia and degenerative disc disease were preexisting.

Dr. Koprivica found claimant to be at maximum medical improvement and assigned the following impairment: 35 percent permanent impairment for the left foot, for the left ankle a 25 percent impairment to the lower extremity, for the right knee a 10 percent impairment of the lower extremity (4 percent whole person), for the left knee a 20 percent permanent impairment. The left lower extremity impairments were combined for a 40 impairment to the left lower extremity (16 percent whole person), for the lumbar spine a 5 percent whole person impairment. The whole person impairments combine for a 25 percent whole person impairment, based on the AMA *Guides*.[8]

Dr. Koprivica also assigned the following restrictions: limit activity to sedentary physical demand level by avoiding lifting from floor level, avoiding frequent or constant bending at the waist, pushing, pulling or twisting, avoiding sustained or awkward posture of the lumbar spine, no squatting, crawling, kneeling or climbing, limiting standing and walking to no more than 30 minutes and should not be on her feet for more than 4 hours in an 8-hour day, limit captive sitting to less than an hour, alternate sitting, standing and walking as needed.

Upon review of the task list, Dr. Koprivica opined that claimant has an 84 percent task loss having lost the ability to perform 16 out of 19 tasks. However, Dr. Koprivica testified that there was one task, number nine that claimant might be able to continue if it doesn't require restraining inmates, which would change her task loss to 79 percent for the loss of 15 out of 19 tasks. And in his report of his examination Dr. Koprivica noted:

> When one looks at the severity of the restrictions attributable to the primary injury of March 11, 2008, there is an issue of permanent total disability. I would defer to Mr. Santner or other appropriate vocational expert to look at the issue of permanent total disability.[9]

[8] Koprivica Depo., Ex. 2 at 19.

[9] *Id.*, Ex. 2 at 20.

Claimant met with Dick Santner, a vocational rehabilitation counselor for a vocational assessment on May 22, 2010, at which time a list of tasks that claimant has performed over the last 15 years was compiled. Interestingly, when Mr. Santner met with claimant he was not provided any medical records and his meeting was before she was examined by several of the physicians who offered opinions regarding her restrictions. Claimant reported a limited capacity to stand and walk and had ability to be on her feet for 15-30 minutes at a time. She also reported she always had pain in her left leg and low back. Claimant was unemployed at the time of this assessment and she was receiving disability payments through KPERS. Mr. Santner developed a list of 15 tasks that claimant had performed in her 15 years of employment before the accident. The parties then stipulated to four additional tasks to be added to Mr. Santner's task list.

Initially, respondent argues that claimant did not meet her burden of proof to establish that she suffered a permanent back impairment as a result of her fall at work. The ALJ analyzed this issue in the following fashion:

> Respondent contends that Claimant's low back complaints are not related to the accidental injury of March 11, 2008. In support of that contention is Dr. Fevurly's testimony who opined that altered gait is not the cause for Claimant's low back impairment. Dr. Fevurly states that 'scientific literature regarding low back pain from antalgic gait is anecdotal at best.'
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> There is no dispute from any of the medical experts, including Dr. Fevurly, that due to Claimant's bilateral lower extremity injuries and subsequent surgeries to treat those injuries that Claimant would develop an antalgic gait. The dispute arises as to whether that is cause for Claimant's low back impairment. Three medical experts testified contrary to Dr. Fevurly's opinion that an antalgic gait at a minimum would aggravate Claimant's degenerative low back condition that results in a permanent impairment to the low back. Two of the medical experts who testified in support of that position are board certified orthopedic surgeons. One orthopedic surgeon saw Claimant at Respondent's request and the other orthopedic surgeon saw Claimant at the request of the Court. It is found that the weight of the evidence is in favor of the finding that the impairment to Claimant's low back was caused by antalgic gait. Therefore, Claimant has an injury to the body as a whole, which entitles her to an award based on a permanent partial general disability.[10]

The claimant did not have any back complaints before the accidental fall at work. Thereafter, she had to use a wheelchair, crutches, and was provided an AFO to wear on her left ankle. Not surprisingly, as noted by all the doctors, she developed an antalgic gait. And as a consequence of her difficulties ambulating she developed back complaints. Her back complaints were addressed in physical therapy and she was provided a TENS unit for her back. All the doctors agreed she had a permanent impairment to her back. The ALJ found the opinions of Drs. Ciccarelli, Prostic and Koprivica more persuasive than Dr.

[10] ALJ Award at 7.

Fevurly. The Board agrees and affirms the finding that claimant suffered a permanent impairment to her back as a natural consequence of her work-related accidental injuries.

In *Casco*, the Kansas Supreme Court provided certain rules. They are as follows:

> Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.
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> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.
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> K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.[11]

But in this case the ALJ determined claimant had suffered not only the scheduled disabilities to her lower extremities but also a nonscheduled "whole body" permanent injury to her back.

In *Bryant*[12], the Kansas Supreme Court stated the general rule:

> If a worker sustains only an injury which is listed in the -510d schedule, he or she cannot receive compensation for a permanent partial general disability under -510e. If, however, the injury is both to a scheduled member and to a nonscheduled portion of the body, compensation should be awarded under -510e.

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[11] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

[12] *Bryant v. Excel*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

Simply stated, the Kansas Supreme Court has held that if the injuries from an accident include both a scheduled member and a nonscheduled portion of the body, all the disabilities should be combined and compensation should be awarded for a nonscheduled whole body permanent impairment.[13]

Claimant's accident resulted in injuries to scheduled members (bilateral lower extremities) and to a nonscheduled portion of her body (back). Consequently, claimant is entitled to compensation for a nonscheduled "whole body" permanent impairment. As previously stated, the Supreme Court determined that where a claimant suffers a combination of injuries to scheduled members and a nonscheduled portion of the body, the claimant cannot receive separate compensation for each scheduled injury as well as separate compensation for the nonscheduled "whole body" injury. Instead, the claimant is entitled to compensation for the nonscheduled "whole body" injury with the scheduled injuries combined in the calculation of the nonscheduled "whole body" permanent impairment.

However, an injured worker with a nonscheduled "whole body" impairment is not limited to compensation based only upon K.S.A. 44-510e but can also seek compensation pursuant to K.S.A. 44-510c for a permanent total disability. And K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In this instance, claimant's injuries involve a combination of scheduled injuries and a nonscheduled "whole body" injury. Although compensation is not available for each individual separate scheduled injury pursuant to K.S.A. 44-510d, nonetheless, those scheduled injuries are combined with the nonscheduled injury to determine the compensation for the nonscheduled "whole body" permanent injury. A nonscheduled "whole body" permanent injury can be compensated either pursuant to K.S.A. 44-510e or K.S.A. 44-510c. And because claimant's combined injuries include parallel bilateral lower extremity injuries, K.S.A. 44-510c(a)(2) provides a presumption of permanent total disability.

[13] See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

Respondent argues that in order for a claimant to qualify for permanent total disability, K.S.A. 44-510c requires that the claimant suffer either a total loss of the extremity or an amputation of the extremity. Simple bilateral injuries to the extremities is not sufficient, according to respondent, for the presumption to come into play. However, the Kansas Supreme Court, in *Casco*, was asked to consider if a claimant was permanently and totally disabled while only suffering a loss of function to both arms. The Court determined that a claimant with a less than 100 percent loss of each upper extremity can qualify as permanently and totally disabled under K.S.A. 44-510c. Total loss of the extremities or an amputation of the extremities is not required in order to bring the statutory presumption into play.

The burden is on the respondent and in this case there was no evidence presented to rebut the presumption of permanent total disability. The Board is mindful that Drs. Prostic and Koprivica provided task loss opinions of less than 100 percent of the individual job tasks but it should be noted that their restrictions would eliminate claimant's ability to perform any of the jobs she had held in the 15 years before her accidental injury because there is at least one task eliminated from each job. And in Dr. Koprivica's report he indicated that his restrictions were severe enough to raise the issue of permanent total disability. The vocational expert was not asked and did not opine whether claimant could engage in substantial gainful employment. And when Dr. Fevurly examined claimant he did not feel she was at maximum medical improvement, consequently his comment that with treatment she should be able to return to light to medium employment was merely speculation as he never examined claimant again.

In summation, the Board affirms the ALJ's determination that claimant suffered permanent injuries to her bilateral knees, left ankle and back which entitles claimant to compensation for a nonscheduled permanent "whole body" injury. Claimant is not precluded from seeking a permanent total disability because she has suffered a combination of scheduled disabilities as well as a nonscheduled "whole body" disability. Pursuant to K.S.A. 44-510(c)(2), as a consequence of the bilateral injuries to her lower extremities, there is a presumption of permanent total disability which the respondent did not rebut. Consequently, claimant is entitled to compensation for a permanent total disability. The Board affirms the ALJ's Award in all respects.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

[14] K.S.A. 2010 Supp. 44-555c(k).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated June 1, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Rebecca Sanders, Administrative Law Judge